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EASTERN CARGO EXPRESS (M) SDN BHD v. FABINA PROPERTIES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
YEOH WEE SIAM J
[CIVIL SUIT NO: 22NCVC-540-11-2014]
B 15 DECEMBER 2015

CONTRACT: *Sale and purchase agreement – Validity of – Allegations of fraud – Second developer overtook development from initial developer – Whether second developer committed fraud by entering into subsale of property without consent of*
C *initial developer – Whether fraud could be inferred to subsequent purchaser by its mere act of purchasing property from second developer – Whether subsequent purchaser could seek protection from exception provided in s. 340(3) National Land Code – Whether subsequent purchaser bona fide purchaser for valuable consideration without notice of property – Whether subsequent purchaser obtained good title of*
D *property*

LAND LAW: *Indefeasibility of title and interest – Sale and purchase agreement – Fraud – Conspiracy to defraud – Allegation of – Second developer overtook development from initial developer – Whether second developer committed fraud by*
E *entering into subsale of property without consent of initial developer – Whether fraud could be inferred to subsequent purchaser by its mere act of purchasing property from second developer – Whether subsequent purchaser could seek protection from exception provided in s. 340(3) National Land Code – Whether subsequent purchaser bona fide purchaser for valuable consideration without notice of property – Whether subsequent purchaser obtained good title of property*

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CIVIL PROCEDURE: *Fraud – Conspiracy to defraud – Allegation of – Second developer overtook development from initial developer – Whether second developer committed fraud by entering into subsale of property without consent of initial developer – Whether fraud could be inferred to subsequent purchaser by its mere act of purchasing property from second developer – Whether subsequent purchaser could*
G *seek protection from exception provided in s. 340(3) National Land Code – Whether subsequent purchaser bona fide purchaser for valuable consideration without notice of property – Whether subsequent purchaser obtained good title of property*

CIVIL PROCEDURE: *Locus standi – Action – Whether developer had beneficial interest to property – Whether interest commenced from developer's purchase of*
H *property under sale and purchase agreements – Whether developer had locus standi to initiate action*

The subject matter of the plaintiff's claim against the defendants was a one and a half storey factory ('Lot 52') to be erected on a piece of land
I ('property') which was part of a commercial and industrial development of the land *ie*, the Meru Industrial Project ('the project'). On 15 April 1996, the plaintiff entered into a sale and purchase agreement ('SPA') with Tiara Etika

Development Sdn Bhd ('Tiara Etika') as the initial developer, and Tiara Etika together with Farplus (M) Sdn Bhd as the proprietors, to purchase the property ('first SPA/principal agreement'). By two loan agreements, the plaintiff took a total loan of RM1,453,000 from the bank. As security for the loan, the plaintiff absolutely assigned to the bank all its rights, title and interests to the property under the principal agreement. The initial developer went into liquidation and was wound up, and the property was not fully completed. Subsequently, Pengurusan Danaharta Nasional Berhad ('Danaharta') acquired the land from the master chargee of the initial developer and appointed the first defendant to complete the development of the land. On 15 October 2002, Danaharta sold to the first defendant the whole development of the land by a sale and purchase agreement ('second SPA/ Danaharta agreement') except the redeemed units *ie*, units which had been redeemed by existing purchasers. The first defendant therefore became the subsequent developer of the project. On 11 August 2011, the plaintiff as the purchaser under the principal agreement sold all its rights, interests and title to the property to the first defendant at the price of RM1,480,000 despite the fact that the first defendant was then already the registered proprietor of the property ('third SPA/first subsale'). The first defendant paid the plaintiff the deposit sum of RM125,000 and five progressive payments amounting to RM470,000, leaving a balance of RM885,000 which remained unpaid despite several extensions of time given by the plaintiff. On 17 June 2013, the first defendant, as the registered proprietor of the property, sold the property on a "as is where is" basis to the second defendant for the sum of RM2,200,000 which was duly settled ('fourth SPA/second subsale'). The second defendant was then registered as the proprietor of the property. The plaintiff claimed that the first defendant had failed to fully settle the outstanding balance purchase price in the sum of RM885,000 to the plaintiff in accordance with the first subsale. The plaintiff averred that the first and second defendants had fraudulently entered into the second subsale with the intention to defraud the plaintiff from being the beneficial owner of the property. The plaintiff claimed, *inter alia*, for an order to declare that the agreement dated 17 June 2013 between the first defendant and the second defendant be null and void. The second defendant also made a counterclaim against the plaintiff and prayed for, *inter alia*, that the sale and purchase agreement dated 17 June 2013 between the first defendant and second defendant be declared valid. The issues that arose were (i) whether the plaintiff had *locus standi* to maintain this action; (ii) whether there was conspiracy of fraud between the first and second defendants for them to enter into the fourth SPA dated 17 June 2013 for the second subsale; and (iii) whether the second defendant was a *bona fide* purchaser for valuable consideration without notice of the property.

A B C D E F G H I

Held (dismissing plaintiff's claim against first defendant and second defendant in part):

(1) By the fact that the bank granted the loan facility to the plaintiff to purchase the property, and the plaintiff had assigned all its rights and interests to the property to the bank, it was highly probable that the redemption sum had been paid for the plaintiff's property. Therefore, the plaintiff had a beneficial interest to the property, which interest commenced from the plaintiff's purchase of the property under the first SPA/principal agreement, and continued through the second SPA/Danaharta agreement, and the third SPA/first subsale between the plaintiff and the first defendant. Therefore, the plaintiff had the *locus standi* to initiate this action against the defendants. (para 23)

(2) The first defendant had committed fraud against the plaintiff by not paying the plaintiff the balance purchase price for the third SPA or first subsale, and for entering into the fourth SPA or second subsale of the property with the second defendant without the prior knowledge and consent of the plaintiff. It was clear that the first defendant had fraudulently sold the property behind the plaintiff's back. However, there was no cogent evidence adduced by the plaintiff to prove that the second defendant had committed any specific fraudulent acts, in conspiracy or in collusion with the first defendant, against the plaintiff. Fraud could not be inferred, or imputed to the second defendant by the mere fact that the second defendant had purchased the property from the first defendant. (paras 32 & 33)

(3) The first subsale *via* the third SPA between the plaintiff and the first defendant was the first or immediate transfer. However, the second subsale *via* the fourth SPA between the first defendant and the second defendant was a second or subsequent transfer. That being the case, the second defendant was entitled to invoke the exception provided in the proviso to s. 340(3) of the National Land Code ('NLC'). Thus, even though the first defendant had committed fraud against the plaintiff, the court was satisfied that the second plaintiff, being a *bona fide* purchaser for valuable consideration without notice of the plaintiff's prior interest in the property, had obtained good title to the property. As such, the second defendant's title ought not to be set aside. (para 41)

(4) The plaintiff had expressly authorised and consented for the first defendant to source for a potential buyer in an attempt to raise funds by selling the property. The plaintiff was more concerned over its monetary interest (*in personam*) instead of the interest on the property (*in rem*). This could be seen from the numerous extensions given by the plaintiff for the first defendant to complete the third SPA/first subsale. Thus, the

second defendant was not a constructive trustee holding the property on trust for the plaintiff. Evidence clearly showed that the second defendant was a *bona fide* purchaser of the property, and was not involved in any fraud committed by the first defendant against the plaintiff. (para 54)

Case(s) referred to:
Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***
CIMB Bank Bhd v. Veeran Ayasamy (Wakil Diri Kepada Letchimi Muthusamy, Si Mati) [2015] 7 CLJ 289 CA ***(refd)***
Eagleburgmann (Malaysia) Sdn Bhd v. Fabina Properties Sdn Bhd & Ors [2015] 1 LNS 872 HC ***(refd)***
Loi Hieng Chiong v. Kon Tek Shin [1983] 2 CLJ 70; [1983] CLJ (Rep) 240 FC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 17
Evidence Act 1950, ss. 10, 15
National Land Code, s. 340(1), (2)(a), (3)(a), (b)

Other source(s) referred to:
Teo Keang Sood & Khaw Lake Tee, *Land Law In Malaysia Cases and Commentary,* 3rd Edn, p 353

For the plaintiff - Maurice Ernest Scully (Wong Shiuann Yih with him); M/s M Scully
For the 1st defendant - Not represented
For the 2nd defendant - Ringo Low Kim Leng (Ng Cheng Kiat & Clement Chong Chyi with him); M/s Tan Suet Wei

Reported by Suhainah Wahiduddin

JUDGMENT

Yeoh Wee Siam J:

Background Facts

The Property

[1] The subject matter of the plaintiff's claim against the defendants is a one and a half storey detached factory, Lot KSA1-52 ("Lot 52"), to be erected on the land held under individual title HS(D) 117120, PT No. 55229 in the Mukim of Kapar, District of Klang, Selangor ("property") measuring approximately 29,924.65 square feet which was part of a commercial and industrial development of the land, ie, the Meru Industrial Project ("project"), held under a master title Geran 24082 Lot 7215 Mukim of Kapar, District of Kelang, Selangor ("land").

A *The First SPA/Principal Agreement*

[2] On 15 April 1996, the plaintiff entered into a sale and purchase agreement ("SPA") with Tiara Etika Development Sdn Bhd ("Tiara Etika") as the initial developer ("initial developer"), and Tiara Etika together with Farplus (M) Sdn Bhd as the proprietors, to purchase the property at the
B agreed price of RM1,816,528 ("principal agreement") (CBOD1 Pt B pp. 65-90).

[3] By two loan agreements ie, the first loan agreement cum assignment (CBOD1 Pt B pp. 91-137), and a second loan agreement (CBOD1 Pt B
C pp. 138-184), both dated 23 September 1996, the plaintiff took a total loan of RM1,453,000 from Pacific Bank Berhad (now known as Malayan Banking Berhad) ("bank") to purchase the property. As security for the loan, the plaintiff absolutely assigned to the bank all its rights, title and interests to the property under the principal agreement.

D **[4]** The initial developer went into liquidation and was wound up on 30 October 2001. The development on the land was halted and left abandoned. The property was not fully completed.

The Second SPA/Danaharta Agreement

E **[5]** Subsequently, Pengurusan Danaharta Nasional Berhad (now managed under Prokhas Sdn Bhd) ("Danaharta") acquired the land from the master chargee of the initial developer namely, Perdana Merchant Bankers Berhad, and appointed the first defendant to complete the development on the land. Danaharta sold to the first defendant the whole development on the land by
F a SPA dated 15 October 2002 ("Danaharta agreement") (CBOD1 and CBOD2 Pt B pp. 186-230), except the "redeemed units" ie, units which have been redeemed by existing purchasers, and includes other units which may have been redeemed from the existing charges at any time prior to the cut-off date, from the existing charges by payment of the relevant sum to Perdana Merchant Bankers Berhad (see recitals D and G, cl. 4.5, and definitions of
G "redeemed units" and "unredeemed units in cls. 16.1 and 16.2, of the second SPA/Danaharta agreement). The first defendant therefore became the subsequent developer of the project.

[6] According to cl. 16.3 of the Danaharta agreement, the first defendant was to obtain the issue of separate documents of title to each redeemed unit,
H and thereafter, *inter alia*, to deliver the separate document of title of the property, which had been identified as a redeemed unit, to the plaintiff as the existing purchaser or such other person as may be legally entitled. The separate document of title for the property was issued on 18 August 2006.

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The Third SPA/First Subsale

[7] By a SPA executed on 11 August 2011, the plaintiff as the purchaser under the principal agreement, sold all its rights, interests and title to the property (under the principal agreement) to the first defendant at the price of RM1,480,000, despite the fact that the first defendant was then already the registered proprietor of the property ("third SPA" or "first subsale") (CBOD2 Pt B pp. 285-295).

[8] The first defendant paid the plaintiff the deposit sum of RM125,000 and five progressive payments amounting to RM470,000, leaving a balance of RM885,000, which remains unpaid despite the several extensions of time given by the plaintiff until 31 December 2013.

The Fourth SPA/Second Subsale

[9] On 17 June 2013, the first defendant, as the registered proprietor of the property, sold the property on a "as is where is" basis to the second defendant for the sum of RM2,200,000 which was duly settled ("fourth SPA" or second subsale") (CBOD2 Pt B pp. 349-368).

[10] The second defendant was registered as the proprietor of the property since August 2013 (CBOD1 Pt A pp. 58-60).

Plaintiff's Claim Against The Defendants

[11] In the amended statement of claim ("amended SOC"), in para. 12, the plaintiff claimed that the first defendant has failed and/or neglected and/or refuse to fully settle the outstanding balance purchase price in the sum of RM885,000 to the plaintiff in accordance with the first subsale.

[12] In para. 16A of the amended SOC, the plaintiff averred that the first and second defendants had fraudulently entered into the second subsale with the intention to defraud the plaintiff being the beneficial owner of the property.

[13] The plaintiff claims the following reliefs against the defendants in para. 20 of the amended SOC:

> 20. (a) A declaration that the Second Defendant is not a *bona fide* purchaser for valuable consideration without notice for the said Lot and to have an Order for the said Lot to be transferred back to the Plaintiff by the Second Defendant at the Second Defendant's own cost;
>
> (b) Specific performance of the Sale and Purchase Agreement dated 11.08.2011 against the First Defendant;
>
> (c) An order that the First Defendant pays to the Plaintiff the outstanding balance purchase price of RM885,000.00 under the Sale and Purchase Agreement dated 11.08.2011;

(d) Alternatively, an order for the Plaintiff to lawfully forfeit the Deposit Sum amounting to RM125,000.00 and the progressive payments amounting to RM470,000.00 made by the First Defendant and to declare the Sale and Purchase Agreement dated 11.08.2011 as being validly terminated;

(e) An order to declare that the Agreement dated 17.06.2013 between the First Defendant and Second Defendant to be null and void, validly terminated and does not rank in priority against the beneficial rights of the Plaintiff on the said Lot in accordance to the Sale and Purchase Agreement dated 11.08.2011;

(f) General damages to be assessed by the Court;

(g) Costs;

(h) Interest of 4% per annum imposed on any general damages or special damages awarded from the date of this Writ of Summons until the full settlement of the judgment debt by the Defendants; and

(i) Such further or other relief as this Honourable Court sees fit.

[14] The second defendant made a counterclaim against the plaintiff and prayed for the following reliefs in para. 20 of the amended defence and amended counterclaim (BOP pp. 34-42, at pp. 40-42):

20. (a) Satu perintah deklarasi dan/atau pengisytiharan bahawa:

(i) Perjanjian Jual Beli bertarikh 17-6-2013 di antara Defendan Pertama dan Defendan Kedua adalah sah dan wajar;

(ii) Defendan Kedua adalah berhak terhadap Hartanah yang dikenali sebagai H.S.(D) 117120, PT 55229, Mukim Kapar, Daerah Klang Negeri Selangor (selepas ini dikenali sebagai "Hartanah tersebut");

(iii) Defendan Kedua merupakan pemilik Hartanah tersebut yang sah di sisi undang-undang;

(iv) Plaintif tidak mempunyai sebarang kepentingan benefisial terhadap Hartanah tersebut; dan

(v) Kesemua Perjanjian Jual Beli yang lain di antara Defendan Pertama dan Defendan Kedua adalah sah dan wajar.

(b) Suatu perintah bahawa kaveat persendirian Plaintif dengan No. Perserahan 54041/2014 ("Kaveat tersebut") bertarikh 11-9-2014 yang dimasukkan terhadap Hartanah tersebut di atas dibatalkan dan/atau diketepikan;

(c) Suatu perintah bahawa Pendaftar Hakmilik/Pentadbir Hakmilik/ Pemungut Hasil Tanah diarahkan dan diperintah ("ordered") dan diberi kuasa ("authorised") untuk mengambil segala tindakan yang

perlu termasuk tetapi tidak terhad kepada pembatalan dan/atau pengetepian Kaveat tersebut untuk memberi pengaruh dan kesan ("to give influence and effect") dan juga untuk mengikut segala perintah yang dibuat oleh Mahkamah Yang Mulia ini dalam tindakan ini;

(d) Suatu perintah bahawa Plaintif dilarang daripada mendaftarkan dan/atau memasukkan kaveat yang lain ke atas Hartanah tersebut berdasarkan alasan dan/atau isu perkara yang sama di H.S.(D) 117120, PT 55229, Mukim Kapar, Daerah Klang Negeri Selangor;

(e) Suatu perintah bahawa Plaintif membayar kos sebanyak RM1,000.00 kepada defendan Kedua untuk urusan-urusan di Pejabat Tanah untuk pembatalan dan/atau pengetepian Kaveat tersebut;

(f) Suatu perintah yang melarang Plaintif dan/atau kakitangan dan/atau agennya daripada memasukkan kaveat-kaveat selanjutnya ke atas Hartanah tersebut;

(g) Ganti rugi am yang akan dinilai oleh Mahkamah yang Mulia ini;

(h) Faedah sebanyak 5% setahun ke atas ganti rugi am daripada tarikh pemfailan Writ Saman sehingga tarikh penyelesaian penuh oleh Plaintif;

(i) Kos; dan

(j) Relif-relif lain yang Mahkamah yang Mulia ini fikirkan suai manfaat.

First Defendant Precluded From Defending

[15] The first defendant has been served with the writ and SOC by the plaintiff by personal service at its business address in Kuala Lumpur on 1 December 2014 (see plaintiff's affidavit of service in encl. 5).

[16] The first defendant failed to enter its appearance by 29 December 2014, as ordered by the Senior Assistant Registrar ("SAR"), during case management ("CM") on 22 December 2014.

[17] The plaintiff filed an application (encl. 7) to enter judgment in default ("JID") against the first defendant for the whole of its claim as in prayer 20 of its amended SOC, based on the third SPA/first subsale.

[18] On 6 March 2015, after hearing encl. 7, and considering that the plaintiff's claim is not only a liquidated claim but is a mixed claim, and intertwined with its claim against the second defendant, I decided that it would be premature and inappropriate for the court to grant a JID of appearance against the first defendant. I therefore made an order to preclude the first defendant from defending the case, and informed counsel for the plaintiff that he would have to wait for the outcome of the plaintiff's case against the second defendant before the court makes the appropriate orders in respect of the first defendant.

[19] The first defendant has been informed by the court of the full trial date on 20 October 2015. However, the first defendant was absent on that day.

Issues

[20] From the common issues to be tried ("common ITBT") filed by both parties, I decided that the main issues in this case are as follows:

(i) whether the plaintiff has *locus standi* to maintain this action;

(ii) if the plaintiff has *locus standi*, whether there is conspiracy or fraud between the first defendant and the second defendant for them to enter into the fourth SPA dated 17 June 2013 for the second subsale; and

(iii) whether the second defendant is a *bona fide* purchaser for valuable consideration without notice of the property.

[21] In determining the above issues, I would also consider the other issues raised in the common ITBT, wherever necessary.

Analysis And Findings

Whether The Plaintiff Has Locus Standi To Maintain This Action

[22] The plaintiff submits that the second defendant did not plead the issue that the plaintiff has no *locus standi* to maintain this action. I am of the view that based on the overall pleadings of the plaintiff, and weighed together with the totality of evidence adduced during the full trial, the plaintiff is entitled to raise the issue on *locus standi*. The court would therefore proceed to consider this issue.

[23] The second defendant submits that the plaintiff has failed to discharge its burden of proving that it is the beneficial owner of the property. Hence, the plaintiff lacks the *locus standi* to initiate this action for the following reasons:

(a) In the Danaharta agreement, the property is considered a redeemed unit, having been redeemed from the charge of the Perdana Merchant Bankers Berhad, the master chargee to the original proprietors. The plaintiff failed to adduce any evidence of payment of such redemption sum, if any.

I find this to be true. Even Chung Soon Thye (PW1), one of the plaintiff's directors and shareholders, under cross-examination admitted that he has no evidence to show that the plaintiff or the plaintiff's financier/the bank has paid the redemption sum to redeem the property from Perdana Merchant Bankers Berhad.

However, there is no evidence adduced by the second defendant to show that to date the master chargee is making a claim to the property. By the fact that the bank granted the loan facility to the plaintiff to purchase the property, and the plaintiff had assigned all its rights and interests to the

property to the bank, it is highly probable that the redemption sum has been paid for the plaintiff's property. Consequently, it is the first defendant's duty and obligation under cl. 16.3 of the Danaharta agreement to apply for a separate title which registers the rights and interests of the plaintiff, as the existing purchaser. I therefore find that the plaintiff does have a beneficial interest to the property;

(b) As the plaintiff could not prove that it has settled with the initial developer in full the purchase price of the principal agreement, the plaintiff could not have acquired any legal interest over the property. The second defendant submits that the plaintiff had only acquired contractual rights under the principal agreement.

PW1, under cross-examination, confirmed that the plaintiff has not paid the full purchase price under the principal agreement at the time when the principal agreement was ended with the execution of the second SPA/Danaharta agreement between Danaharta and the first defendant;

(c) In the circumstances, the initial developer is the only party who still has the residual legal and beneficial right over the property, but not the plaintiff.

Regarding the issues in (b) and (c) above, the plaintiff submits, and therefore admits, that the full balance purchase price was not yet paid to the initial developer because the initial developer was wound up and the project was halted at around 85% completion. Several parties, including the appointed liquidator and even the first defendant tried to revive/rehabilitate the project but the project was not fully completed. As such, it is obvious that any full balance of the purchase price was not yet due pending the final completion of the project by the first defendant. The plaintiff cannot be faulted for it.

I agree with the plaintiff's above submissions. Under the second SPA/Danaharta agreement, the property is a redeemed unit. The first defendant is bound by that agreement. It is now not open to the first defendant, or even the second defendant, to contend otherwise;

(d) Clause 15 of the principal agreement (CBOD1 Pt B p. 75) provides as follows:

15. SUBSALE

If the Purchaser desires to enter into any subsale of the said Property before the payment of the full Purchase Price and all dues owing to the Developer, and before the transfer and/or Assignment by the Developer of the said Property to the Purchaser, the Purchaser shall pay an administrative fee at the rate of One per cent (1.00%) of the new Purchase Price to the Developer, together with any legal fees and disbursements incurred by the Developer arising therefrom.

The second defendant submits that PW1 could not prove that the plaintiff, as purchaser, has paid the initial developer the administrative fee of 1% as required by cl. 15 of the principal agreement for the plaintiff's first subsale of the property to the first defendant.

I am of the view that the plaintiff's failure to pay the administrative fee is an issue between the initial developer and the plaintiff, and that can be the subject matter of a separate action. There is no evidence that the initial developer has made any claim on the plaintiff for the administrative fee. It is also noted that even the first defendant, as the subsequent developer, did not make any claim for the administrative fee from the plaintiff. The plaintiff's alleged failure to pay any such administrative fee does not render the first SPA/principal agreement invalid. Neither does it affect nor nullify the plaintiff's beneficial interest to the property;

(e) The second defendant submits that the plaintiff, as borrower, has assigned all its rights under the principal agreement to the bank under the two loan agreements. Therefore, the plaintiff has no right to deal with or sell the property to the first defendant without the bank's approval.

Clause 4 of the first loan agreement (CBOD1 Pt B p. 99) provides as follows:

4. ASSIGNMENT

4.1 For the consideration aforesaid the Borrower(s) hereby absolutely assign(s) to the Bank the said Property and the full and entire benefit of the Sale Agreement together with all rights title and interests of the Borrower (s) therein PROVIDED ALWAYS that notwithstanding the assignment herein contained or any other provision of this Agreement the Borrower (s) shall and hereby undertake(s) to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower(s) expressed and contained in the Sale Agreement. (emphasis added)

There is no evidence that the plaintiff had obtained the bank's prior consent or approval to sell the property to the first defendant in the first subsale. However, according to PW1, the plaintiff had fully paid the loan to the bank, but he did not show the court on what date the loan was settled. The plaintiff relied on the bank's letter dated 11 January 2011 (CBOD2 Pt B p. 263) to show that the plaintiff managed to negotiate with the bank for the full and final settlement of RM875,000 against a payment of the then outstanding amount of RM2,571,851.72 for both the term loans. However, the bank's letter dated 11 January 2011 is merely a letter to the plaintiff's directors to inform the plaintiff's management that the bank agreed to accept the RM875,000 as full and

final settlement subject to certain terms and conditions stated therein. Thus, the bank's letter dated 11 January 2011 is not proof of the plaintiff's payment of the RM875,000 to the bank.

PW1 further referred to the bank's letter dated 28 June 2013 (CBOD2 Pt B p. 321) written to him as the guarantor for the loan to thank him for the payment of RM875,000 as full and final settlement of the loan and to discharge him from all liabilities under the letter of guarantee. PW1 also referred to the bank's letter dated 7 August 2013 to the plaintiff's solicitors, M/s M Scully requesting them to prepare the documents for the discharge of the property.

From PW1's evidence, the court accepts that as on 28 June 2013 the plaintiff had already fully settled the loan. However, when the plaintiff executed the third SPA for the first subsale to the first defendant on 11 August 2011, the plaintiff had not yet fully settled its loan with the bank. This is in breach of the plaintiff's obligation on assignment under cl. 4.1 of the first loan agreement. In my opinion, this is an issue between the bank and the plaintiff, but it does not affect or nullify the plaintiff's beneficial interest to the property. It appears to me that by the fact that the bank was prepared to discharge the property *vide* its letter dated 7 August 2013 to the plaintiff's solicitors, the plaintiff's first subsale to the first defendant is not an issue at all with the bank; and

(f) The second defendant submits that there is no proof that the plaintiff is the rightful beneficial owner of the property when it entered into the third SPA for the first subsale with the first defendant as there is no deed of receipt and reassignment, and the charge with the bank remains unsatisfied until to date (see company search with CCM in CBOD1 Pt A pp. 1-7). Thus, the plaintiff cannot initiate this claim against the second defendant.

Regarding this issue, PW1 had explained that the first defendant could not be located to execute the relevant documents on its part as the subsequent developer. My view is that even though there is no physical reassignment by the bank, the bank has not raised any objections to the first subsale by the plaintiff to the first defendant. It is therefore highly probable that the loan has been fully and finally settled by the plaintiff. In fact, the bank requested the plaintiff's solicitors to prepare the discharge documents for the property.

Despite the objection raised by the second defendant in paras. (a) to (f) above, I am satisfied that the plaintiff has a beneficial interest to the property which interest commenced from the plaintiff's purchase of the property under the first SPA/principal agreement, and continued through the second SPA/Danaharta agreement, and the third SPA/first subsale between the plaintiff and the first defendant. Therefore, the plaintiff has the *locus standi* to initiate this action against the defendants.

Whether There Is Conspiracy Or Fraud Between The First And Second Defendants For Them To Enter Into The Fourth SPA Dated 17 June 2013 For The Second Subsale

[24] The second defendant has paid the first defendant the full purchase price of RM2,200,000 for the purchase of the property under the fourth SPA dated 17 June 2013 in the second subsale. Since 27 August 2013, the second defendant has been registered as the proprietor of the property. The second defendant has obtained indefeasibility of title to the property under s. 340(1) of the National Land Code ("NLC").

[25] The question now is whether the second defendant's indefeasible title is rendered defeasible by fraud.

[26] Section 340(1), (2) and (3) of the NLC provide as follows:

> 340. Registration to confer indefeasible title or interest, except in certain circumstances.
>
> (1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.
>
> (2) The title or interest of any such person or body shall not be indefeasible –
>
> (a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or
>
> (b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or
>
> (c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.
>
> (3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) –
>
> (a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and
>
> (b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:
>
> Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

"Fraud" has been given its meaning in s. 17 of the Contracts Act 1950 as follows:

17. "Fraud" includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:

(a) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge or belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive; and

(e) any such act or omission as the law specially declares to be fraudulent.

[27] Regarding the meaning of fraud, the Federal Court in *Loi Hieng Chiong v. Kon Tek Shin* [1983] 2 CLJ 70; [1983] CLJ (Rep) 240 at p. 247; [1983] 1 MLJ 31 at p. 36 stated as follows:

In *Waimiha Sawmilling Company Limited v. Waione Timber Company Limited* [1926] AC 101 Lord Buckmaster, after citing the above passage, said at p. 106-7:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear.

[28] In the recent case of *CIMB Bank Bhd v. Veeran Ayasamy (Wakil Diri Kepada Letchimi Muthusamy, Si Mati)* [2015] 7 CLJ 289 at p. 297; [2015] 5 MLR 603 at p. 610 Mohd Zawawi Salleh JCA stated as follows:

The elements of fraud and/or conspiracy must be proved by clear, cogent and convincing evidence. There must be something more than mere failure or an omission on the part of the 3rd defendant. There can never fraud and/or conspiracy cannot exist, where the intent to deceive does not exist.

[29] The standard of proof required to prove fraud in a civil case is one based on a balance of probabilities (see Federal Court's decision in *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584).

[30] In the present case, the first defendant failed to pay the plaintiff the balance purchase price of RM885,000 to the plaintiff for the third SPA or first subsale. Upon conducting land searches and private caveat searches sometime in April 2014, the plaintiff discovered that the property has been transferred without the knowledge and consent of the plaintiff by the first defendant to the second defendant. It was revealed that the first defendant and second defendant had entered into the fourth SPA on 17 June 2013 for the

A sale of the property for the purchase price of RM2,200,000 of which a deposit of RM1,000,000 was paid to the first defendant (PW-WS Q & A 46, 47 & 49).

[31] The plaintiff alleges that the first defendant, through Ong Tai Chin, and the second defendant by way of fraud, deceit or fraudulent transaction B have denied the plaintiff's beneficial rights or interest on the property resulting from dishonesty or fraudulent conducts between the first and second defendants by transferring the ownership of the property to the second defendant.

C **[32]** The first defendant has been precluded from defending the claim by this court. The first defendant was also not in court for the trial. On record, there is no evidence adduced by the first defendant to rebut the plaintiff's claim. From the evidence adduced by the plaintiff and the second defendant, it is clear that the first defendant had committed fraud against the plaintiff by not paying the plaintiff the balance purchase price for the third SPA or D first subsale, and for entering into the fourth SPA or second subsale of the property with the second defendant without the prior knowledge and consent of the plaintiff. It is clear that the first defendant had fraudulently sold the property behind the plaintiff's back, and the property is now registered under the name of the second defendant as the proprietor.

E **[33]** It is noted that in the plaintiff's pleading of fraud in its amended SOC, the specific fraudulent acts of the second defendant in the second subsale have not been particularised with any details (BOP p. 16). From the evidence adduced by the plaintiff, I find that the plaintiff has failed to prove the element of fraud. It is observed that the only basis for the plaintiff to allege F fraud was based on the ground that the second defendant ought to have taken further or more steps in conducting the land search. There is no cogent evidence adduced by the plaintiff to prove that the second defendant had committed any specific fraudulent acts, in conspiracy or in collusion with the first defendant, against the plaintiff. Fraud cannot be inferred, or imputed to G the second defendant by the mere fact that the second defendant purchased the property from the first defendant.

[34] According to PW1, the plaintiff bought three factory lots from the same project, including the property, in 1996. Due to the plaintiff's financial difficulties, the first defendant offered to buy back all the three lots. Hence, H after the other two lots were sold to the first defendant, the plaintiff executed the third SPA/first subsale in respect of the property. The plaintiff trusted the first defendant due to the successful completion of the sale of the earlier two lots to the first defendant.

I **[35]** Just because the second defendant had previously purchased over 100 factory lots in the same project by way of subsequent sale, it does not prove that the second defendant was acting fraudulently in collusion with the first

defendant against the plaintiff. It is without doubt that the first defendant had defrauded the plaintiff in respect of the property. However, the plaintiff's redress for fraud is only against the first defendant, but not against the second defendant. From PW1's evidence, it is clear that at all times the plaintiff had allowed the property to be held in the first defendant's name to enable the first defendant to sell it for the plaintiff. Now that the property is no longer with the first defendant, the plaintiff's interest is to recover the balance purchase price from the first defendant. There is no evidence adduced by the plaintiff on the damages that it had suffered.

Whether The Second Defendant Is A Bona Fide Purchaser For Valuable Consideration Without Notice Of The Property

[36] Under s. 340(2)(a) of the NLC, the title of any person shall not be indefeasible in case of fraud. Therefore, it is liable to be set aside under s. 340(3)(a) and (b) of the NLC.

[37] The second defendant in its defence has denied the allegation of fraud and stated that the second defendant has no knowledge and/or notice pertaining to the first subsale and/or the plaintiff's interest. The second defendant pleads that it is a *bona fide* purchaser for valuable consideration without notice.

[38] The question now is whether the second defendant can seek the protection of, and benefit from the exception provided in the proviso to s. 340(3) of the NLC.

[39] In *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 at p. 294; [2010] 2 MLJ 1 at p. 20, the Federal Court stated:

> [52] Furthermore, even though sub-s (3)(a) and (b) refer to the circumstances specified in sub-s(2) they are restricted to subsequent transfer or to interest in the land subsequently granted thereout. So it could not apply to the immediate transferee of any title or interest in any land.

[40] Based on the above case, the plaintiff submits that the proviso to s. 340(3) of the NLC would only apply to a subsequent transfer of the property. In the present case, the first defendant's transfer of the interest in the property is an immediate transfer. Therefore, the second defendant cannot have the benefit of the said proviso.

[41] With respect, I am of the view that the first subsale *via* the third SPA between the plaintiff and the first defendant is the first or immediate transfer. However, the second subsale *via* the fourth SPA between the first defendant and the second defendant is a second or subsequent transfer. That being the case, the second defendant is entitled to invoke the exception provided in the proviso to s. 340(3) of the NLC. Thus, even though the first defendant had committed fraud against the plaintiff, the court is satisfied that the second

defendant, being a *bona fide* purchaser for valuable consideration without notice of the plaintiff's prior interest in the property, has now obtained good title to the property. As such, the second defendant's title ought not to be set aside.

[42] The plaintiff submits that the second defendant's solicitors, Tan Zher Rhu (DW2) of M/s Chur & Associates, has failed to conduct further searches on the caveats lodged by Danaharta, beyond the Register to verify the existence of any third party's interest.

[43] In *Land Law In Malaysia Cases and Commentary* 3rd Edn, the learned authors, Teo Keang Sood and Khaw Lake Tee, at p. 353 under "Note" stated:

> [5.73] It follows from this case that a solicitor in a sale and purchase transaction, may not rely merely on the conclusiveness of the register document of title alone in carrying out his duties towards his client in respect of matters not required or yet to be noted in the register. Instead, the solicitor is required to go behind the register to investigate. This is especially so where there is an established practice not to rely merely on making the normal searches of the register. Where such is the case, the conclusiveness of the register document of title will not be a factor which the court will take into account in determining whether a solicitor has used reasonable care and skill in discharging his duties towards his client in land dealing matters generally.

[44] The plaintiff in *Eagleburgmann*, and the plaintiff in the present case rely on the Court of Appeal's decision in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526 where Raus Shariff JCA (now PCA) at p. 554 [42] to [44] stated as follows:

> [42] Had the learned trial judge taken the above facts and circumstances into consideration, he cannot possibly conclude that the 1st defendant was a *bona fide* purchaser for valuable consideration, so as to be protected under s. 340(3) of the Code. To me, the 1st defendant had acted hastily. He concluded the sale without any proper investigation into the title or the persons claiming to be proprietors. No doubt he had every right to take advantage of the low price that was offered to him but he took the risk. When he embarked into such risk, it cannot be at the expense of the plaintiffs. This is because while he had a choice, the plaintiffs had none. In fact, the plaintiffs were helpless. The plaintiffs could not do anything to prevent the fraud. Even locking the title in a safe would not had help the plaintiffs. In such circumstances the court must not favour the 1st defendant, over the plaintiffs. To do so, would be doing injustice to the plaintiffs.
>
> [43] Further, had the evidence adduced in this case been properly considered and assessed by the learned trial judge, a reasonable inference would be that the 1st defendant knew at the time he bought the said land, the purchase price was below the market value. But he wanted to take advantage of the low price. He did a fast track to complete the purchase.

In doing so he disregarded his obligations to investigate the alleged proprietors and the genuineness of the documents. My respectful view is that a purchaser in good faith does not include a purchaser who is careless or who had been negligent. In *Oliver v. Hinton* [1899] Chancery Division 264 Lindley MR said:

> *To allow a purchaser who acts with such gross carelessness to deprive a prior innocent mortgage of her priority would be the greatest injustice.*

[44] *So too here. The 1st defendant is under the obligation to investigate property all matters relating to the sale of the said land and not to just blindly accept what was claimed by the 'vendors' as correct and genuine. When he failed to take the ordinary precautions which ought to be taken in such a matter he is not entitled to the protection of the court.* (emphasis added)

[45] I agree with the above statements in *Au Meng Nam* (*supra*). However, with respect to counsel for the plaintiff in his submissions, I do not think that DW2 is required to do a land search ("search") beyond the Register in the circumstances of the present case. DW2's search dated 13 May 2013 on the title to the property reveals that the first defendant is the registered proprietor (CBOD1 Pt A pp. 51-53). There was no caveat lodged by the plaintiff at the material time ie, at any time before the date of execution of the fourth SPA/second subsale on 17 June 2013. The plaintiff's interest was not endorsed on the property at the time of execution of the fourth SPA or the second subsale. The plaintiff's name never appeared on the search. It is observed that the plaintiff only lodged its private caveat on the property on 11 September 2014. However, DW2's search showed that there was a caveat lodged by a third party ie, one Ong Pah Kian @ Koh Poh Kian ("Ong Pah Kian").

[46] According to DW2, to facilitate the transfer from the first defendant to the second defendant, the second defendant paid the RM1,000,000 to the first defendant for their onward transmission to the caveator, Ong Pah Kian, directly as a precondition for the withdrawal of the private caveat lodge over the property.

[47] Under cross-examination, DW2 stated that she did not do a further search on the Danaharta caveat lodged over the property since it has already expired and/or lapsed at the material time of transfer of ownership from the first defendant to the second defendant.

[48] Based on DW2's evidence, I am satisfied that the entire transaction was conducted by DW2 with due diligence and following normal conveyancing practice. I do not think that there is any gross carelessness by DW2 in conducting the search on the property. The plaintiff's name or interest never appeared on the title at the material time. The issue document of title to the land has already been issued by the land office. Thus, it is unreasonable to require DW2 to search beyond the Register at the land office, or to search into the history of the Danaharta caveat. Even if DW2

had searched the Danaharta caveat which could possibly have led her to obtain knowledge of the second SPA/Danaharta agreement, it would only reveal to DW2 that Danaharta had sold the land, excluding the property which is a redeemed unit, to the first defendant. However, that would not change the fact that on the title to the property, the first defendant's name is registered therein as the owner, and there is no lodgement of any private caveat by the plaintiff. That being the case, in accordance with the usual conveyancing practice, it is reasonable for DW2 to proceed with the documentation for transfer of the property to the second defendant.

Similar Fact Evidence In Plaintiff's Case And Eagleburgmann's Case

[49] The plaintiff highlighted another suit filed against the first and second defendants in the present case ie, Shah Alam High Court case of *Eagleburgmann (Malaysia) Sdn Bhd v. Fabina Properties Sdn Bhd & Ors* [2015] 1 LNS 872 (Civil Suit No. 22NCVC-537-11/2014) which was recently decided by Lim Chong Fong JC (see his judgment dated 28 September 2015 in Tab 1 of plaintiff's BOA).

[50] The plaintiff submits that there are similar facts involved in the same project at Meru Industrial Park and similar circumstances of the plaintiff's claim herein.

[51] The plaintiff relies on s. 10 and s. 15 of the Evidence Act 1950 which provide as follows:

> Things said or done by conspirator in reference to common design
>
> 10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of those persons, in reference to their common intention after the time when the intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it;
>
> Facts bearing on question whether act was accidental or intentional
>
> 15. When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that the act formed part of series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

[52] In *Eagleburgmann* (*supra*), the learned Judicial Commissioner ("JC"), *inter alia*, declared *Eagleburgmann*/the plaintiff as the legal and beneficial owner of the factory lot/property and ordered the Registrar of Titles to cancel the registration of Cemerlang Emas Sdn ("Cemerlang Emas") (ie, the third defendant in that case, and the second defendant in the present case) as the registered owner of the property. From the evidence adduced before him,

the JC was satisfied that Cemerlang Emas had no knowledge of the plaintiff's interest in the factory lot. Cemerlang Emas did not collude with the first defendant to procure the factory lot. Cemerlang Emas was not a party or privy to the fraud of the first defendant in *Eagleburgmann*. The JC, however, found that Cemerlang Emas failed to satisfactorily prove that it has paid the first defendant (Fabina Properties Sdn Bhd) for the purchase of the factory lot. At the trial, Cemerlang Emas produced photocopies of cheques and vouchers of its purchase of the factory lot. Upon close scrutiny, the JC found that they were for Cemerlang Emas' purchase of other factory lots from the first defendant ie, for Lots PT 54968 and PT 55207. For the factory lot which was the subject matter of the trial, there was no cogent documentary evidence of payment that was produced to support the oral assertion of DW1 in *Eagleburgmann*. Therefore, the JC held that Cemerlang Emas has not sufficiently proved that it was indeed the *bona fide* purchaser of the factory lot for valuable consideration. In consequence and notwithstanding that the registered title of Cemerlang Emas to the factory lot is "defeasible" (ie, the word used by the JC), he held that Cemerlang Emas accordingly also holds the same as a constructive beneficiary for the plaintiff as beneficiary. The JC further held that Cemerlang Emas is the immediate transferee of the first defendant that committed the fraud and could not therefore avail itself to the proviso in s. 340(3) of the NLC. Consequently, the registered title of Cemerlang Emas is and remains defeasible by reason of the fraud of the first defendant as the immediate transferor notwithstanding that Cemerlang Emas might have been the *bona fide* purchaser for valuable consideration.

[53] With respect to the plaintiff's submissions, I do not think that this court is bound by similar facts or evidence of the *Eagleburgmann*'s case, if any. The issues to be tried in the present case are founded on different causes of action from *Eagleburgmann*. None of the witnesses in the present case testified on the evidence in the *Eagleburgmann*'s case that would directly affect or impact on the present case. The present case involves a different plaintiff for a different property, no doubt in the same development project. In *Eagleburgmann*, the plaintiff did lodge a private caveat on the property. However, the first defendant in that case advised the plaintiff to withdraw the private caveat, but with liberty to relodge the caveat subsequently. The JC found that the plaintiff was not negligent in not relodging a new private caveat. In the present case, the plaintiff had never lodged any private caveat on the property at the material time. The evidence in the present case shows clearly that the second defendant has paid the full purchase price to the first defendant, and that the second defendant is a *bona fide* purchaser for valuable consideration without notice of the plaintiff's claim to the property. As I had found earlier in this judgment, I am of the view that in the third SPA which is actually the first subsale, the first defendant had already committed fraud against the plaintiff by not paying the balance purchase price even though the separate title to the property was already registered in the first defendant's name. Therefore, the sale by the first defendant to the second defendant, by

way of the fourth SPA or the second subsale, is to be considered as a subsequent sale which entitles the second defendant to benefit from the protection of the proviso to s. 340(3) of the NLC as a *bona fide* purchaser.

[54] Despite the fact that the first defendant may be considered as a constructive trustee holding the property on behalf of the plaintiff, however, as submitted by the second defendant, in the present case, the plaintiff has expressly authorised and consented for the first defendant to source for a potential buyer (which happened to be the second defendant) in an attempt to raise fund by selling the property. Based on the plaintiff's conduct, it appears to me that the plaintiff is more concerned over its monetary interest (*in personam*), instead of the interest on the property (*in rem*). This can be seen from the numerous extensions given by the plaintiff for the first defendant to complete the third SPA/first subsale.

[55] From the totality of the evidence adduced, this court does not find that the second defendant is a constructive trustee holding the property on trust for the plaintiff. The evidence shows clearly that the second defendant is a *bona fide* purchaser of the property, and is not involved in any fraud committed by the first defendant against the plaintiff.

Decision

[56] Going by the above considerations, the court has decided, on a balance of probabilities, as follows:

Regarding the plaintiff's claim against the first defendant and second defendant

Prayers 20(a), (b), (d), (e), (f) and (h) are dismissed.

Prayer 20(c) is allowed.

Prayer 20(g) : The plaintiff is ordered to pay costs of RM15,000 to the second defendant.

: The first defendant is ordered to pay costs of RM15,000 to the plaintiff.

Prayer 20(h) : The first defendant is ordered to pay the plaintiff interest at 5% per annum on the sum in prayer 20(c) from the date of judgment until full realisation.

Regarding the second defendant's counterclaim against the plaintiff (BOP pp. 40-42)

Prayers 20(a) (i) to (v), (b), (c), (d), (e) and (f) are allowed.

Prayers 20(g) and (h) are dismissed.

Prayer 20(i) : No order as to costs.